

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

3 DYNAMIC 3D GEOSOLUTIONS LLC,) AU:14-CV-00111-LY
4 Plaintiff) AU:14-CV-00112-LY
5 VS.) AU:14-CV-00526-LY
6 HALLIBURTON COMPANY, et al.,) AU:14-CV-00527-LY
7 Defendants.) AU:14-CV-00528-LY
) AU:14-CV-00529-LY
)
) AUGUST 12, 2014

TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE LEE YEAKEL

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13 GEOSOLUTIONS LLC:
14
15 LMK RESOURCES
16 HALLIBURTON COMPANY
17 LANDMARK:
18
19 PARADIGM, B.V.:
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produced by computer.

09:28:34 1 (Open Court)

09:28:34 2 THE COURT: We've got a whole passel of Dynamic 3D

09:28:40 3 Geosolutions LLC cases here today to talk about. I can tell by

09:28:48 4 the lineup of who's here and who's there that its looks like a

09:28:52 5 fair fight.

09:28:56 6 Let me start with the plaintiff and let me get

09:29:00 7 announcements as to who you represent, and we'll go from there.

09:29:08 8 MR. COLLINS: Your Honor, Michael Collins for

09:29:11 9 Plaintiff Dynamic 3D Geosolutions.

09:29:15 10 THE COURT: In all of the cases, I presume,

09:29:17 11 Mr. Collins?

09:29:18 12 MR. COLLINS: Yes, sir. In all of the cases. And I

09:29:20 13 have with me today a client representative, Mr. Gary Fischman.

09:29:25 14 THE COURT: Very good. Thank you.

09:29:32 15 All right. Let's start and go slowly so I can get a

09:29:35 16 check on this. Let me run down the line. Who is here for the

09:29:37 17 defendants in the *Dynamic v. LMK Resources* case?

09:29:42 18 MR. HEJNY: Scott Hejny with McKool Smith,

09:29:45 19 Your Honor.

09:29:47 20 THE COURT: All right. And for the defendants in the

09:29:50 21 *Paradigm* case?

09:29:52 22 MR. CHIBIB: Mike Chibib, Bracewell & Giuliani, for

09:30:00 23 Paradigm.

09:30:00 24 THE COURT: And in the *IHS* case?

09:30:02 25 MR. WHITTLESEY: Your Honor, David Whittlesey with

09:30:05 1 Andrews Kurth. And we also have Jeff Sherwood via telephone.

09:30:10 2 THE COURT: Mr. Sherwood, do we have you on the
09:30:12 3 phone?

09:30:13 4 MR. SHERWOOD: Yes, Your Honor. Good morning.

09:30:16 5 THE COURT: Good morning. You're coming through loud
09:30:17 6 and clear. Let me tell the lawyers in the courtroom that the
09:30:20 7 way the system is set up, that when any of you address the
09:30:23 8 Court, if you would speak into one of the microphones, we can
09:30:26 9 ensure that Mr. Sherwood hears it. You don't have to raise
09:30:30 10 your voice, but I think if we're into the microphone, the way
09:30:33 11 it's wired, that will get that taken care of.

09:30:36 12 And in the *Emerson Electric* case and *Roxar*?

09:30:40 13 MR. SHAW: Ethan Shaw for the Emerson, Your Honor.
09:30:45 14 Roxar has not yet been served.

09:30:49 15 MS. HANSEN: And also Linda Hansen. And, actually,
09:30:53 16 Roxar, Inc. has been served, but not Roxar AS. So we will be
09:30:58 17 appearing on behalf of them once they're served.

09:31:01 18 THE COURT: All right. Thank you. And the
09:31:05 19 *Halliburton* and *Landmark* case?

09:31:08 20 MR. HEJNY: Again, Scott Hejny, Your Honor, with
09:31:13 21 McKool Smith.

09:31:18 22 THE COURT: And Schlumberger?

09:31:19 23 MR. MCCONNICO: Your Honor, Steve McConnico for
09:31:23 24 Schlumberger.

09:31:23 25 MS. WAHLS: And Ann Marie Wahls, also for

09:31:26 1 Schlumberger.

09:31:29 2 THE COURT: I think that's it. Did I leave out any
09:31:31 3 cases?

09:31:32 4 (No response)

09:31:32 5 THE COURT: Good. If we have a scorecard, it's
09:31:34 6 always good to start.

09:31:37 7 Well, we are here on what I think are, if I've
09:31:44 8 counted them correctly, six cases that we have in this group.
09:31:47 9 And the reason for this getting together, and we can be
09:31:51 10 relatively informal on it, is to talk about, in general, how
09:31:59 11 we're going to manage these cases and what we need to do to get
09:32:02 12 them under control.

09:32:03 13 I know all of you probably know my tendencies and
09:32:13 14 what I like to do, which is initially get to Markman as quickly
09:32:16 15 as we can get to Markman and not do anything else until we get
09:32:21 16 to Markman. There are always exceptions. This Court is not a
09:32:28 17 one-size-fits-all. If you've look at previous scheduling
09:32:31 18 orders that I have done in cases -- and I'm sure you have
09:32:34 19 because I'm sure I have been Googled to death by all of you on
09:32:38 20 all of my tendencies and everything that I do -- do not think
09:32:42 21 that I have a standard scheduling order with regard to time and
09:32:48 22 time elapsing, because I don't. There is, coincidentally, a
09:32:55 23 lot of scheduling orders that may look the same as to time, but
09:32:59 24 I don't want you to feel that you're bound by any particular
09:33:04 25 time line.

09:33:04 1 I like to get to Markman as quickly as possible
09:33:08 2 because, one, sometimes cases settle after the claims
09:33:11 3 construction order is reviewed and, secondly, patent cases are
09:33:17 4 extremely expensive to try and deal with. They were expensive
09:33:25 5 before, and then along came the America Events Act, and they
09:33:30 6 got more expensive, in my opinion, because now we have to
09:33:33 7 divide all of these cases out into separate things and then the
09:33:37 8 Court has to determine how they're going to put them back
09:33:41 9 together to get through the initial stages of the case.

09:33:43 10 I will tell you, and then I will hear from you, that
09:33:47 11 one of the things I desire to do in a case such as this is to
09:33:56 12 at least combine the cases for pretrial matters. Because what
09:34:00 13 I don't want to run into is the same depositions being taken in
09:34:07 14 case after case after case over and over again.
09:34:12 15 That does not mean that I'm going to try to push you or force
09:34:17 16 you to try the cases together.

09:34:19 17 The first thing you should know is, number one, don't
09:34:23 18 be concerned about this court's docket. It is a big docket,
09:34:27 19 but we get to our cases. Secondly, this court is not concerned
09:34:32 20 with how long it will take this case to try, whether it
09:34:36 21 combines a lot of the defendants or whether we try each of the
09:34:40 22 six cases separately. I owe the taxpayers an honest day's work
09:34:48 23 every day, and I don't mind whether I'm sitting on this bench
09:34:53 24 in one case for six weeks or 20 cases in six weeks. So it just
09:34:59 25 doesn't matter. So that should not enter into your thinking in

09:35:02 1 any way.

09:35:03 2 What Judge Sparks and I got out of the new

09:35:06 3 courthouse, once the promise of getting additional federal

09:35:10 4 judges was broken by your congress, is we have additional

09:35:15 5 courtroom space. We also have Judge Ezra, who is a senior

09:35:21 6 judge who sits in San Antonio who likes to come to Austin

09:35:24 7 because he likes our courthouse better. And he is a hard

09:35:29 8 worker. And so that allows me -- because I would not send him

09:35:34 9 a patent case because then he would never come back if that was

09:35:38 10 one that I asked for help on. But he is always available to

09:35:43 11 handle the remainder of my docket. So it is not a problem for

09:35:47 12 me to sit through a long case. So don't go into this with any

09:35:51 13 idea that, if you don't get it settled, the court is in any way

09:35:55 14 going to be concerned about how long it takes a case to try

09:35:59 15 because I am not going to be concerned about it.

09:36:01 16 I mentioned the cost of these cases earlier because,

09:36:06 17 for some reason when I read the literature, it seems like the

09:36:09 18 judges always get blamed for the cost of the patent litigation.

09:36:14 19 Well, the reason that we're going to try to get to Markman

09:36:18 20 early before you get wide open discovery is to deprive you of

09:36:22 21 your trips. Patent lawyers I know like to take depositions in

09:36:26 22 Shanghai and London and places all over the world. You

09:36:30 23 generally don't have to do that, if ever, before we get to

09:36:35 24 claims construction. So that's why I try to hold us to an

09:36:39 25 initial schedule of getting to claims construction before we do

09:36:45 1 anything else.

09:36:46 2 Now, that having been said, I do note that we have
09:36:52 3 rendered initial scheduling orders in two of the cases, the one
09:36:57 4 that I will call the *Halliburton* case for simplicity or in the
09:37:02 5 vernacular of patent lawyers, I might as well call it the 111
09:37:07 6 case, and then the *Schlumberger* case, which is the 112 case.
09:37:11 7 That leaves us with the *Emerson*, or the 526 case, the
09:37:17 8 *LMK Resources*, or the 527 case, the *Paradigm*, or the 528 case,
09:37:23 9 and the *IHS*, or the 529 case.

09:37:30 10 I will start with the plaintiff, not because I have
09:37:33 11 any particular affinity for plaintiffs in these cases, but I
09:37:39 12 read from top to bottom usually and the plaintiff comes above
09:37:42 13 the "v." and it's a convenient default. So Mr. Collins, tell
09:37:45 14 me, one, your opinion on combining all of those cases for
09:37:53 15 initial scheduling and pre-Markman discovery, with the
09:37:58 16 understanding -- and all of you listen to this -- that
09:38:01 17 post-claims construction, we're going to have another
09:38:04 18 scheduling conference and we'll figure out where we're going to
09:38:07 19 go the rest of the way.

09:38:09 20 So, Mr. Collins, let me start with you.

09:38:11 21 MR. COLLINS: Your Honor, Dynamic 3D Geo's position
09:38:18 22 is that the currently scheduled Markman for the first two filed
09:38:22 23 cases against Schlumberger and Halliburton should go forward as
09:38:27 24 scheduled Thanksgiving week. And I've spoken with counsel for
09:38:30 25 both Schlumberger and for Halliburton, and I'm not going to try

09:38:33 1 to speak for them here today, but I believe it's their position
09:38:36 2 as well that they would like to move it -- move it forward as
09:38:41 3 scheduled because we've already made some significant progress.
09:38:46 4 We've -- we've provided infringement contentions to the
09:38:49 5 defendants. They have provided the plaintiff with invalidity
09:38:53 6 contentions. We've exchanged claim terms for construction, and
09:38:57 7 this week we're going to agree on a list of claim terms. The
09:39:01 8 case is moving along quite nicely.

09:39:06 9 Our proposal for the other four cases would be to
09:39:09 10 enter a scheduling order that looks very similar in format to
09:39:13 11 the one entered in the first two cases, but push the dates back
09:39:17 12 four months or so to account the four-month later filing date
09:39:21 13 and also to account for the fact that the holidays intervene.

09:39:25 14 And we -- we've spoken to counsel for all four of the
09:39:29 15 defendants in the second filed case and have at this point
09:39:36 16 maybe not agreed, but at least they're aware. And I'll let
09:39:40 17 them speak for themselves today.

09:39:43 18 THE COURT: Well, tell me why, from your point of
09:39:47 19 view, I should want to do this twice?

09:39:50 20 MR. COLLINS: Well, the idea is that the first
09:39:53 21 Markman with Schlumberger and Halliburton, although it's in no
09:39:57 22 way binding on the other four defendants and I'll concede that,
09:40:00 23 has the potential to greatly simplify the issues in the case.
09:40:05 24 And, frankly, I think it may leave -- my experience with these
09:40:08 25 serially filed cases -- and I've been on the defendant's side

09:40:11 1 as well -- is that by the time you get to the third or fourth
09:40:15 2 set of defendants -- and these are East Texas cases, but in
09:40:18 3 this case, the second group of defendants -- a lot of the claim
09:40:20 4 terms have already been taken care of and the defendants and
09:40:23 5 the plaintiff can agree on them. And, quite frankly, without
09:40:26 6 going into the claim construction arguments, some of the claim
09:40:31 7 terms may be -- the constructions may be dispositive on some of
09:40:36 8 the claims, if not all.

09:40:37 9 THE COURT: Well, except for the fact that the other
09:40:40 10 four defendants -- groups of defendants don't get to play.

09:40:45 11 MR. COLLINS: Well, that's correct, Your Honor. But
09:40:46 12 they get to play starting anew four months down the road, and
09:40:53 13 it may be that they can use what's -- what's happened
09:40:57 14 previously.

09:40:57 15 THE COURT: All right. Let me start with
09:41:02 16 Halliburton, then. What is Halliburton's position on this?

09:41:09 17 MR. HEJNY: Your Honor, Scott Hejny, McKool Smith, on
09:41:13 18 behalf of Halliburton. Halliburton agrees in principle with
09:41:16 19 the plaintiff that we would like to continue with the current
09:41:19 20 schedule. Obviously, I don't know if that's going to work for
09:41:25 21 the Court for the very reasons that you set forth, and I'm
09:41:27 22 almost certain I'm going to get push-back from the other
09:41:30 23 defendants as to the case schedule.

09:41:32 24 We absolutely believe that it makes sense to get to
09:41:35 25 Markman as soon as possible. The current schedule does indeed

09:41:39 1 work for Halliburton. We're going to run into some conflicts
09:41:42 2 with the beginning of the following year. Obviously, we'll do
09:41:45 3 what the Court wants with respect to the schedule if it's
09:41:48 4 Your Honor --

09:41:49 5 THE COURT: That's generous.

09:41:52 6 MR. HEJNY: We always like to please the Court,
09:41:54 7 Your Honor. But we would like to move forward with the current
09:41:57 8 date, but we understand the obstacles that would be facing the
09:42:01 9 Court when, as you say, the others couldn't play.

09:42:05 10 THE COURT: Thank you. And Schlumberger.

09:42:07 11 MS. WAHLS: Good morning, Your Honor. Ann Marie
09:42:09 12 Wahls of Latham & Watkins on behalf of Schlumberger.

09:42:11 13 Schlumberger also joins in this instance the
09:42:13 14 plaintiff's position as far as moving forward with the current
09:42:16 15 schedule that Your Honor set in April of this year. We
09:42:19 16 believe, since our case was filed in February, it's been
09:42:22 17 pending now for six months and we'd like to avoid any further
09:42:26 18 delay, if possible, and continue on.

09:42:28 19 And as Mr. Collins had noted, the parties have
09:42:30 20 exchanged their initial infringement contentions as well as the
09:42:35 21 invalidity contentions, and we're well on the way to continuing
09:42:38 22 on with the Markman schedule that Your Honor set in April. So
09:42:41 23 we would like to maintain that schedule, if possible.

09:42:45 24 THE COURT: Thank you.

09:42:47 25 MS. WAHLS: Thank you, Your Honor.

09:42:49 1 THE COURT: Emerson.

09:42:53 2 MS. HANSEN: Linda Hansen on behalf of Emerson.

09:42:57 3 As was mentioned before, our clients include Emerson

09:42:59 4 Electric Company, Emerson Process Management, LLLP,

09:43:04 5 Roxar, Inc., and Roxar AS. But, as of today, Roxar AS has not

09:43:10 6 been served with the compliant in this case. So particularly

09:43:13 7 on behalf of them, but on behalf of all of our clients here, we

09:43:17 8 just simply cannot join with the schedule that Schlumberger and

09:43:21 9 Halliburton have and we would ask that, if the cases are all

09:43:24 10 going to be joined together for scheduling, as we believe is

09:43:27 11 appropriate, that they be moved out at least four and perhaps

09:43:30 12 six months to accommodate at least service of all the

09:43:33 13 defendants. We have offered to the plaintiff that we would

09:43:36 14 accept service on behalf of Roxar AS because they're Norwegian

09:43:40 15 and might be difficult to serve, but we have not yet been

09:43:43 16 served with that.

09:43:44 17 THE COURT: Thank you. And the *LMK* case?

09:43:48 18 MR. HEJNY: Again, Your Honor, Scott Hejny, McKool

09:43:55 19 Smith. LMK would be willing to proceed with the current

09:43:57 20 Markman schedule that's in place now.

09:44:03 21 THE COURT: I wondered how you were going to put one

09:44:06 22 foot on the canoe and one foot on the dock.

09:44:12 23 MR. HEJNY: They're both in the canoe, Your Honor.

09:44:16 24 THE COURT: And the *Paradigm* case?

09:44:25 25 MR. CHIBIB: Mike Chibib on behalf of Paradigm,

09:44:29 1 Your Honor.

09:44:29 2 Paradigm would agree with the Court to consolidate
09:44:29 3 the case for pretrial purposes. We would also, similar to
09:44:32 4 Emerson, ask for additional time. Four to six months is
09:44:36 5 appropriate in our estimation, but obviously wherever you can
09:44:39 6 find a spot for the Markman hearing in late spring would be
09:44:43 7 great. And we would obviously object to the notion of two
09:44:45 8 Markmans because of our inability to participate, at least
09:44:48 9 fully, in the first one. Thank you.

09:44:51 10 THE COURT: Thank you. And the *IHS* case?

09:45:01 11 MR. WHITTLESEY: David Whittlesey for IHS. As long
09:45:05 12 as we're not put on the current schedule, which nobody is
09:45:08 13 asking for, I think we're okay. I've seen some other dates
09:45:11 14 that have been proposed by Paradigm pushing it out. We're
09:45:16 15 generally okay with those dates as well. So I was wondering
09:45:20 16 how you were going to do two Markman hearings.

09:45:23 17 THE COURT: Well, the way you do two Markman hearings
09:45:26 18 is you do one and then you do another one. That's not the hard
09:45:29 19 logistical component here.

09:45:32 20 MR. WHITTLESEY: We'll leave that up to the Court,
09:45:34 21 Judge. But we're okay with the dates. I think Paradigm has
09:45:38 22 some they've proposed, and we're okay with those. Just as long
09:45:40 23 as we're not put on the current schedule is fine with us.

09:45:48 24 THE COURT: All right. That was not particularly
09:45:52 25 surprising. Let me address this initially, then, to the

09:45:58 1 plaintiffs and the attorneys in the 111 and the 112 cases, the
09:46:05 2 ones that currently have a scheduling order in effect:

09:46:15 3 What type of discovery have you been doing or do you
09:46:17 4 anticipate pre-Markman?

09:46:23 5 MR. COLLINS: Your Honor, to date, no discovery has
09:46:26 6 been done pre-Markman. We have agreed with Defendant
09:46:31 7 Halliburton to an exchange of certain limited documents that
09:46:35 8 may have some bearing on claim construction and are going to
09:46:39 9 implement that privately. We will be submitting for the
09:46:44 10 Court's consideration and agreed protective order shortly to
09:46:49 11 cover that exchange of documents.

09:46:53 12 I can tell you that Schlumberger has identified
09:46:57 13 several experts that it may use in connection with claim
09:47:05 14 construction and the pre-claim construction tutorial. And
09:47:08 15 it -- we, of course, will want to --

09:47:10 16 THE COURT: Now, I want to stop you right there. I
09:47:13 17 do not ever want to hear "tutorial" in the same sentence with
09:47:17 18 "claims construction" in my court. That is a pet peeve of
09:47:22 19 mine. My tutorials have nothing to do with claims
09:47:26 20 construction, and everybody in this room needs to know that.

09:47:28 21 Somehow in the literature and in the CLE conferences,
09:47:35 22 the Patent Bar has gotten into their head -- and maybe some of
09:47:40 23 my colleagues are responsible for this -- that the tutorial is
09:47:43 24 related to the Markman hearing. It is not. So know this, as
09:47:50 25 we talk about tutorials in my court, tutorials are technical

09:47:55 1 tutorials where you teach me your science or you teach me about
09:48:00 2 your product or you teach me about your process in order that I
09:48:05 3 can come up to speed factually on what we're talking about and
09:48:10 4 get my hands around what the object of the dispute is as
09:48:15 5 opposed to the dispute itself.

09:48:19 6 I do not want, when we have a tutorial, it focused on
09:48:22 7 claim terms or anything of that nature. In my court the
09:48:28 8 tutorial generally precedes the Markman hearing because what
09:48:32 9 you have to deal with with me is a generalist judge who is
09:48:37 10 trying to learn as fast as he can about the product or the
09:48:41 11 process or what's involved here. And it helps all of you if I
09:48:47 12 get it in layers -- if it's layered.

09:48:50 13 So it's easier for me to understand your case at
09:48:56 14 claims construction if I know what the product or the process
09:48:59 15 or the device or the thing or the formula that we're talking
09:49:03 16 about is. So I just want to put a stop to that at the
09:49:07 17 beginning. I don't want you focused as we move toward Markman
09:49:11 18 on whatever you're going to do at your tutorial as being
09:49:15 19 focused on the Markman hearing. That is not helpful to me.

09:49:18 20 As I've said numerous times, what I want you to do is
09:49:24 21 to teach me about what's involved here. You can do it
09:49:28 22 yourselves; you can have a scientist do it; you can have the
09:49:32 23 inventor do it. If it's something that somebody can put their
09:49:37 24 hands on and you can bring it, that is always helpful, to see
09:49:42 25 what we're talking about.

09:49:44 1 Possibly the least effective way to conduct a
09:49:47 2 tutorial is have a lawyer do a PowerPoint. And because I over
09:49:51 3 and over say that's the least effective way to do it, probably
09:49:54 4 90 percent of my tutorials involve lawyers doing PowerPoints.

09:49:59 5 I tell you that has marginal effectiveness. So know that.

09:50:04 6 So end of lecture, Mr. Collins. You may proceed.

09:50:08 7 You walked into that, and I couldn't let it go by.

09:50:11 8 MR. COLLINS: I'm about to sum up, Your Honor. Long
09:50:13 9 story, short: No discovery has yet been conducted pre-Markman.
09:50:17 10 We anticipate that some limited discovery is going to occur in
09:50:21 11 the form of an exchange of documents with Halliburton and
09:50:25 12 perhaps reciprocal depositions of experts with Schlumberger.

09:50:29 13 THE COURT: All right. Does Halliburton and
09:50:37 14 Schlumberger agree with that basically?

09:50:39 15 MR. HEJNY: Yes, Your Honor. Halliburton does.

09:50:42 16 MS. WAHLS: Ann Marie Wahls on behalf of
09:50:44 17 Schlumberger.

09:50:44 18 Schlumberger has included in its exchange of claim
09:50:50 19 terms a claim that claim one is indefinite. And as a result of
09:50:55 20 that, out of an abundance of caution, we did disclose an expert
09:50:58 21 to speak, you know, to that topic in particular. And as
09:51:03 22 Mr. Collins indicated, we also disclosed a Schlumberger witness
09:51:08 23 to speak at the technology tutorial to provide Your Honor with
09:51:12 24 information about the technology and the accused systems.

09:51:16 25 THE COURT: Well, it sounds to me like, at least as

09:51:19 1 to the two cases we have scheduling orders in, we're not going
09:51:24 2 far out. As I have said before, and I say it for the benefit
09:51:28 3 of the lawyers that haven't been here in this case before,
09:51:31 4 other than minor discovery along the lines that was just
09:51:41 5 mentioned, I've always had a hard time figuring out why
09:51:44 6 discovery was needed on claims construction anyway.

09:51:47 7 I will tell you-all that, well before *Phillips*, it
09:51:50 8 was this Court's position that it would be the rare case that
09:51:55 9 couldn't be determined from the intrinsic record on claims
09:51:59 10 construction. I approach claims construction the same way I
09:52:02 11 approach statutory construction, and that is you look at the
09:52:06 12 term the way it was used, you look at the surrounding language
09:52:09 13 of where it was used, you look at how the inventor used it.
09:52:16 14 And it is the rare case that that can't be determined solely
09:52:21 15 from the intrinsic record.

09:52:23 16 So you-all need to know that, even if you're going to
09:52:26 17 present -- I don't bar the lawyers from presenting extrinsic
09:52:34 18 evidence at the Markman hearing. I feel like you should be
09:52:37 19 able to make your record the best possible way you can make
09:52:40 20 your record. But as a practice tip, you're always going to be
09:52:46 21 better off and have a stronger case in front of me if you have
09:52:50 22 a strong argument on the intrinsic record.

09:52:55 23 Seldom, if ever, where one party has argued the
09:52:58 24 intrinsic record and another party has said, Well, I should
09:53:01 25 ignore that and just look at extrinsic evidence, has that party

09:53:06 1 prevailed on the extrinsic record. So I tell you that in order
09:53:10 2 that you can do whatever you want to do with it. It is much
09:53:16 3 more persuasive.

09:53:19 4 Also, when you make your Markman arguments, you are
09:53:23 5 much better off, since no one has the burden of proof on claims
09:53:27 6 construction, to argue to me why you should get what your
09:53:34 7 construction is, not why the other side should not get theirs.
09:53:37 8 Again, I'm not going to tell you that the negative argument
09:53:41 9 always fails, and you may make it. But you are much better off
09:53:45 10 using the time to instill in this court a strong belief as to
09:53:51 11 why you're correct as opposed to why your opponent is
09:53:55 12 incorrect, because many times what you get in that case is I
09:53:59 13 will come up with my own construction that was different from
09:54:02 14 both of you. So it's always better, if you really believe that
09:54:06 15 you have the correct construction, to argue your position as
09:54:11 16 strongly as you can.

09:54:19 17 All right. Do any of the defendants in the other
09:54:21 18 cases, the 526 through 529 cases, foresee the need for a large
09:54:30 19 amount of pre-Markman discovery.

09:54:34 20 MR. CHIBIB: Your Honor, Mike Chibib. We would only
09:54:37 21 envision possibly deposing inventors. But, beyond that,
09:54:42 22 nothing else.

09:54:44 23 THE COURT: All right. Well, here is my concern. I
09:54:55 24 am not comfortable with the idea of having a group of people
09:55:13 25 that I'm later going to hear an argument about their having to

09:55:17 1 accept Markman construction that I do in the first instance
09:55:22 2 when they didn't have an opportunity to be involved in it. I
09:55:31 3 also do not want to have one Markman hearing and render a
09:55:41 4 Markman order and then get to hear why that was wrong in the
09:55:45 5 next Markman hearing. In other words, part of this is giving
09:55:49 6 the plaintiff two bites at the apple at my claims construction,
09:55:53 7 which I really don't want to do.

09:55:54 8 So the bad news for Dynamic 3D, Halliburton, and
09:56:01 9 Schlumberger is I want to jointly schedule this and I want to
09:56:05 10 have one Markman hearing. And I think that results in it being
09:56:09 11 pushed out a ways. And what I have to say in that regard is,
09:56:20 12 Mr. Collins, you-all were the ones who waited four weeks to
09:56:23 13 file the other set of cases, or however it was, because that's
09:56:26 14 just the way it is.

09:56:27 15 Although I don't mind trying cases back to back and
09:56:31 16 spending a lot of time on the bench during trials, I don't find
09:56:35 17 it efficient for this court to chop up all of the proceedings
09:56:42 18 when it looks to me like there are going to be some similar
09:56:46 19 issues in the case. So that means that I want to do a new
09:56:58 20 master scheduling order on these cases and proceed to Markman
09:57:10 21 forward later than currently scheduled.

09:57:13 22 So there was talk that was thrown around a little bit
09:57:16 23 ago that there had at least been some dates discussed. How
09:57:19 24 detailed is that? How close do you-all think you are on
09:57:25 25 determining a general set of dates for all six combined cases?

09:57:32 1 MR. CHIBIB: I think, Your Honor, what was discussed
09:57:35 2 before was Paradigm had circulated among Defendants some
09:57:39 3 proposed dates that were four months pushed based on the filing
09:57:43 4 dates of the cases. We do not have consensus here among
09:57:46 5 Defendants yet, obviously, and I haven't shared that with
09:57:50 6 Plaintiff's counsel yet. We just spoke briefly on the phone
09:57:53 7 about it last evening. So we can do that, of course.

09:57:57 8 THE COURT: And I misspoke. It wasn't four weeks.
09:57:59 9 It was four months.

09:58:00 10 MR. CHIBIB: Yes, Your Honor.

09:58:01 11 THE COURT: All right. Well, let's talk about, while
09:58:03 12 you're here, what -- is there any problem with going ahead with
09:58:11 13 the tutorial on November the 12th? I cannot imagine there
09:58:15 14 needs to be any discovery or anything with regard to the
09:58:20 15 tutorial. And it matters not to me how early or how late that
09:58:24 16 it comes, and I don't see any reason why it can't remain on
09:58:29 17 November the 12th.

09:58:32 18 MR. COLLINS: Plaintiff is agreeable.

09:58:36 19 THE COURT: Can everybody be prepared for tutorial on
09:58:38 20 November the 12th?

09:58:42 21 MS. HANSEN: Emerson Electric is agreeable.

09:58:45 22 THE COURT: Well, if anybody disagrees?

09:58:50 23 (No response)

09:58:50 24 THE COURT: All right. We're going to keep the
09:58:52 25 tutorial on the 12th. Now, let me say a little bit about that

09:58:55 1 if you haven't been in front of me before. They're very
09:59:01 2 informal in my court. We conduct them in the courtroom for the
09:59:06 3 obvious reason there are more people here than I can put in my
09:59:08 4 chambers. Otherwise, they would be so informal that we would
09:59:11 5 have them in chambers, but we have more space here.

09:59:15 6 There will not be a reporter present for your
09:59:17 7 tutorial. It is totally off the record. Nothing that is said
09:59:21 8 in the tutorial by lawyers or witnesses or anybody else can be
09:59:25 9 used for cross-examine -- cross-examination purposes or
09:59:29 10 impeachment purposes of any other type of thing. It is an
09:59:33 11 informal way for you to focus on the topics that I told you
09:59:39 12 about earlier.

09:59:42 13 The plaintiff leads off just, again, because that's
09:59:47 14 the default. The defendants will get as much time as they want
09:59:54 15 equal to the plaintiff, although my experience has been, never
10:00:00 16 have the defendant or defendants taken as much time as the
10:00:03 17 plaintiff because, if you're playing by the rules, you're not
10:00:06 18 going to have disagreement with what the plaintiff says and I
10:00:10 19 don't have to hear it twice when you're telling me about how
10:00:13 20 what we're talking about works. I would urge you to get
10:00:19 21 together and work out how you are going to proceed on this.

10:00:23 22 I do not want advocacy at the tutorial -- who wins
10:00:27 23 and who loses. But I found that I am constantly having, in the
10:00:33 24 11 years I've been a judge on this bench, having to watch what
10:00:38 25 I say because lawyers glom onto every little word and construe

10:00:42 1 it differently from what I mean.

10:00:48 2 Lack of advocacy does not mean you can't have
10:00:54 3 disagreement. Clearly the plaintiff thinks that these groups
10:00:56 4 of defendants have infringed on the patent. Clearly the
10:01:00 5 defendants disagree with the plaintiff that there has been
10:01:05 6 infringement. So it could happen that parts of your
10:01:10 7 disagreement could be how the product or the device or the
10:01:15 8 process works.

10:01:18 9 So disagreement is separate from advocacy. It is not
10:01:23 10 a problem if Mr. Collins puts on testimony about the product or
10:01:30 11 puts on people who tell me how it works and draws a conclusion
10:01:36 12 from it for one or more of the defendants to say, Well, that's
10:01:40 13 not the way it works or that's not the way our products work.
10:01:44 14 I understand there is a disagreement here.

10:01:46 15 So when I say I don't want advocacy, I mean I don't
10:01:50 16 want one of you arguing on anything that you think will win or
10:01:55 17 lose the case other than showing me what's involved. You will
10:01:59 18 have plenty of time to argue your conclusions later on as we go
10:02:07 19 through the case. So that's going to be the ground rules on
10:02:09 20 the tutorial, and I will expect you-all to have conversations
10:02:13 21 or whatever you need to do before November the 12th to talk
10:02:17 22 about that and how you're going to proceed and how you want to
10:02:21 23 proceed on the tutorial.

10:02:22 24 Now, let me tell you the reason that I have a
10:02:28 25 tutorial in the courtroom and I want you here doing it. Many

10:02:33 1 judges who try patent cases have the luxury of having you-all
10:02:35 2 submit discs and they have, apparently, a lot of free time and
10:02:38 3 they sit in their chambers and watch the discs and learn all
10:02:42 4 about this. I don't have that luxury with my docket. If I
10:02:45 5 don't have you right here telling me about it, I can tell you
10:02:48 6 that if you sent me discs I would never look at them and we
10:02:52 7 wouldn't accomplish anything. So that's why I do it this way.

10:02:55 8 Now, if you present slides at the tutorial -- I know
10:03:03 9 this ought to be axiomatic and everybody's going to laugh when
10:03:07 10 I say this, but it is really interesting to me how many times
10:03:10 11 it doesn't happen -- number your slides and have a booklet of
10:03:17 12 your slides for me because I want to take notes on them. And
10:03:21 13 in my notes that I take, I may say "slide number 36 explains
10:03:27 14 this the best" for future reference. If I don't have slide
10:03:31 15 numbers, I don't know how to do that. So it just astounds me
10:03:37 16 sometimes and I think law firms forget to number their slides.
10:03:41 17 But it is of very little utility for me if you're going to have
10:03:46 18 slides if you don't number them and you don't have hard copies
10:03:50 19 of the slides for me. So if you're going to do that, do that.

10:03:51 20 Also, if you're going to have some nature of
10:03:54 21 explanatory thing, have a copy for me. Also have a copy of
10:04:00 22 anything you're going to present and, effectively, two copies
10:04:04 23 for the court so Ms. Carmona, who is my chambers attorney who
10:04:08 24 has overall supervision of your file, will also have a set
10:04:12 25 because she often marks on things differently than I mark on

10:04:20 1 things. So that will help you get your point across because
10:04:23 2 we'll work together on this.

10:04:24 3 Right now I have the tutorial starting at 9 o'clock
10:04:27 4 on the 12th. We will leave it that way. I have not scheduled
10:04:32 5 anything behind you, but I would not expect this to take a day.
10:04:37 6 What I want you to do as you get closer in your planning
10:04:42 7 process on how you're going to present this, to get in touch
10:04:44 8 with Ms. Carmona after you-all, plaintiff and defendants, have
10:04:48 9 discussed jointly how long you think this will take and refine
10:04:52 10 the time as best you can.

10:04:55 11 Time is at a premium in the federal courts in Austin.
10:04:59 12 Some of you who are here a lot have heard this song a lot. I
10:05:06 13 repeat it. There's 677 active United States District Judges in
10:05:11 14 the country when all positions are filled. Judge Sparks and I
10:05:14 15 have two of the top five weighted average dockets of the 677.
10:05:23 16 That means that we have a growing civil docket and a growing
10:05:28 17 criminal docket. Part of the civil docket that is growing are
10:05:33 18 the number of patent cases that are filed in the Austin
10:05:36 19 Division of the Western District of Texas.

10:05:39 20 It is my desire to give you reasonable and adequate
10:05:43 21 time to get everything done, but I need your help on that
10:05:47 22 because any place I can buy out a couple of hours or buy back a
10:05:52 23 couple of extra hours of time, I've got a whole lot of lawyers
10:05:57 24 that want that time so I can do something else. So don't get
10:06:03 25 me up until the Monday before the tutorial before you decide

10:06:09 1 how long it's going to take.

10:06:12 2 Work on this. Figure out what you agree on. Figure
10:06:16 3 out how you can have combined things. It is only a tutorial.
10:06:20 4 The case is not going to be won or lost at the tutorial. And
10:06:23 5 as I've told you, nobody is going to get to use anything they
10:06:27 6 hear in the tutorial in any part of the case. So I would
10:06:32 7 appreciate it if you would work with me on that.

10:06:35 8 Now, if we are looking at jumping roughly four months
10:06:49 9 out, that would effectively move the Markman hearing from late
10:07:04 10 November to late March or early April. What is your general
10:07:23 11 preference? I can tell you that I could work in time for a
10:07:29 12 Markman hearing in this case, the best week for me would be the
10:07:32 13 week of March the 23rd, depending on what your schedules are.
10:07:37 14 I'm not telling you you have to accept that. I'm just telling
10:07:41 15 you what works for me, because I would like to set dates for
10:07:46 16 this and then we work back on everything.

10:07:48 17 Now, Mr. Collins, you rise.

10:07:50 18 MR. COLLINS: Your Honor, the week of March 23rd
10:07:52 19 would be acceptable for Plaintiff.

10:07:56 20 THE COURT: What's the defendants' reaction to that?

10:08:04 21 MS. WAHLS: Your Honor, Anne Marie Wahls on behalf of
10:08:07 22 Schlumberger. I think that week perhaps won't work for us
10:08:10 23 because of scheduling conflicts. We could do either April or I
10:08:14 24 don't know if May would also be a possibility.

10:08:17 25 THE COURT: Because of what?

10:08:21 1 MS. WAHLS: Scheduling issues in other cases --
10:08:24 2 trials and things in other cases.

10:08:26 3 THE COURT: What does everyone else think?

10:08:32 4 MS. HANSEN: Linda Hansen for Emerson. We too would
10:08:35 5 prefer to move the Markman hearing into April or May.
10:08:38 6 Preferably May, actually. We've got similar conflicts with
10:08:42 7 other matters that are pending.

10:08:44 8 THE COURT: Well, let me tell you I'm trying to
10:08:47 9 accommodate you and I'm trying be fair here. And Mr. Collins
10:08:53 10 has already had to swallow four months. I really am not happy
10:08:59 11 about six months, particularly when this court's May calendar
10:09:05 12 is extremely full. I can find some time the week of March the
10:09:13 13 30th. I might be able to find some time later in April, but I
10:09:30 14 am -- I am really not inclined to go to May with the Markman
10:09:34 15 hearing in this case because I think you-all ought to be able
10:09:37 16 to work in a day for a Markman hearing.

10:09:46 17 MS. HANSEN: Your Honor, I agree that one day isn't
10:09:48 18 the problem. It's the preparation and getting things
10:09:51 19 organized. There is a conflict. We would prefer April, if
10:09:54 20 possible. Thank you.

10:09:56 21 THE COURT: Well, tell me about April.

10:10:00 22 MS. HANSEN: We could work any time in April.

10:10:22 23 MR. COLLINS: Your Honor, from the plaintiff's
10:10:24 24 perspective, March 30th would work well, too. If the Court is
10:10:28 25 inclined to push it back into April, we could be available the

10:10:33 1 first week of April. Our preference would be to keep it at
10:10:37 2 March 23rd, that week.

10:10:41 3 THE COURT: Well, I have a pharmaceuticals case set
10:10:49 4 to go to trial in late April. Cases can always settle, but I
10:10:56 5 never rely on them settling. April the 3rd is Good Friday and
10:11:07 6 the beginning of Passover this year. I'm not going to set
10:11:12 7 anybody on that day.

10:11:25 8 All right. Here are your choices: Thursday,
10:11:35 9 April 2nd or Monday, April 6th. If we can get a consensus, we
10:11:42 10 will. Otherwise, I will just decide one.

10:11:52 11 MR. COLLINS: Your Honor, from the plaintiff's
10:11:54 12 perspective, we would prefer Thursday, April 2nd, as opposed to
10:11:59 13 having one early Monday morning.

10:12:04 14 MS. WAHLS: Your Honor, Ann Marie Wahls on behalf of
10:12:07 15 Schlumberger. We would agree on April 2nd.

10:12:09 16 THE COURT: Everybody else be available April 2nd?

10:12:12 17 MR. WHITTLESEY: April 2nd fine with IHS, Judge.

10:12:15 18 MR. CHIBIB: Okay. With Paradigm, Your Honor.

10:12:17 19 MR. HEJNY: Same for Halliburton and LMK, Your Honor.

10:12:20 20 THE COURT: All right. Then the Markman is going to
10:12:22 21 be April the 2nd, which is a Thursday, and we will start it at
10:12:28 22 9 o'clock.

10:12:30 23 Now, it is -- know, as you talk about and work out
10:12:36 24 your disputed terms, that I intend for the Markman to be done
10:12:47 25 in a day. I think we can do it in a day. I do not want to --

10:12:51 1 when I see a case that has a whole lot of disputed terms in it,
10:12:57 2 I generally think that is a failure among the lawyers. I
10:13:01 3 realize judges approach this a different way. But what I want
10:13:07 4 you to do is concentrate on the terms that you think may be
10:13:11 5 outcome determinative of this case -- the important claims
10:13:15 6 construction terms.

10:13:16 7 Now, if you've been paying attention, you probably
10:13:21 8 know that, although it is risky to predict the Supreme Court of
10:13:26 9 the United States, I have a suspicion that by the time this
10:13:32 10 case gets to the Federal Circuit that I will have a whole lot
10:13:36 11 of discretion that I don't have now in claims construction.
10:13:40 12 You cannot read what the Supreme -- I believe, what the
10:13:44 13 Supreme Court did with regard to giving back to the trial
10:13:48 14 courts their discretion on what's an exceptional case and then
10:13:56 15 see the issue on which they accepted cert. in the *Teva Chem*
10:14:00 16 case and not believe that they're going to do something similar
10:14:03 17 which is going to restore a lot of -- well, of discretion to
10:14:09 18 the trial court in claims construction.

10:14:13 19 So I think the days of having a whole lot of disputed
10:14:16 20 terms so you can hide a "gotcha" in the record -- and I know
10:14:19 21 nobody in front of me ever did that. It's the other patent
10:14:21 22 lawyers that have done that in order that you have some buried
10:14:26 23 little time bomb for the Federal Circuit. I think -- or in
10:14:29 24 their waning hours. I may be totally wrong on this. But if I
10:14:34 25 were ever going to predict the Supreme Court, I think the

10:14:40 1 Supreme Court is moving toward a lot more discretion with the
10:14:43 2 trial judges in patent case than we heretofore know. So I'm
10:14:48 3 not trying to talk anybody out of asserting a claim as
10:14:53 4 disputed, but I urge you to sit down and talk about it and
10:14:57 5 assert only the important claims.

10:15:00 6 Now, I know some judges restrict you on the number of
10:15:07 7 claims. I'm not going to do it going in. I'm going to see
10:15:11 8 what you can work out on your own. We may discuss it later.

10:15:17 9 You had something?

10:15:17 10 MR. HEJNY: Yes, Your Honor. I know you just said
10:15:19 11 you don't commonly restrict the number of claims. I presume
10:15:23 12 you mean restrict the number of terms at the Markman hearing?

10:15:26 13 THE COURT: That's what I meant. That's what I
10:15:28 14 meant, the number of terms.

10:15:30 15 MR. HEJNY: One thing that could possibly help
10:15:32 16 crystallize things for Markman, Your Honor, would be to adopt
10:15:35 17 an order similar to what the Federal Circuit has done in the
10:15:39 18 past limiting the number of asserted claims. I don't know if
10:15:43 19 the Court has done that in the past or if that's something that
10:15:45 20 Your Honor would consider, but there are 93 claims in the
10:15:49 21 Dynamic 3D patents. They've asserted 67 against Halliburton
10:15:56 22 and I think mid-70s against Schlumberger.

10:16:01 23 And I think if that pattern follows for the other
10:16:04 24 defendants, I think if we could come to some sort of agreement
10:16:06 25 or the Court would adopt some sort of limiting on the number of

10:16:10 1 asserted claims prior to Markman, that could cut down on
10:16:14 2 Markman briefing and expedite the Markman proceeding.

10:16:17 3 THE COURT: Well, it may. But I would initially like
10:16:20 4 you-all to talk about it and try to be reasonable. I expect
10:16:26 5 the lawyers that appear in front of me to demean themselves
10:16:30 6 like the professionals they are at all times. I realize we
10:16:33 7 have at least one client representative in the room. I don't
10:16:36 8 know if we have others. But I urge all of you to tell your
10:16:41 9 clients that, from this court's point of view, it's the lawyers
10:16:45 10 that run the case, not the clients that run the case.

10:16:48 11 I do not like gamesmanship. I do not like to see a
10:16:53 12 lot of claims asserted or terms in dispute that appear to me to
10:17:00 13 be clearly one party or another party wanting to go to scorched
10:17:06 14 earth on things. And, believe me, that's easy to tell. And so
10:17:11 15 what I want you-all to do is rationally sit down and discuss
10:17:15 16 this.

10:17:15 17 The fact of the matter is that everybody in this room
10:17:18 18 with a pulse knows that you're not going to try 60 or 70
10:17:24 19 disputed claims to a jury. If you think you are, then you
10:17:27 20 haven't tried very many cases and you're not much of a trial
10:17:31 21 lawyer, because you're not going to hold the jury's attention
10:17:35 22 if you force them to wade through that much. It's not going to
10:17:41 23 happen.

10:17:42 24 But at the early stages I prefer to see what you-all
10:17:45 25 can work out. And then if we can't get a reasonable number

10:17:49 1 worked out, you-all can come back and we'll talk about that and
10:17:54 2 we'll talk about why you can't get it worked out to a
10:17:58 3 reasonable number of claims. And that way I can make a
10:18:01 4 decision as who I think the troublemakers are in the case. And
10:18:05 5 that's one of the roles you don't want to play. But that's
10:18:09 6 what I do. So I want to see if you-all can work this out
10:18:17 7 realistically and logistically at the beginning yourselves,
10:18:21 8 because I expect that's what the lawyers do.

10:18:24 9 As I've said a couple of times this morning, patent
10:18:27 10 cases are very expensive. Lawyers get paid a lot of money on
10:18:31 11 patent cases. It's not my job to tell you what to do so you
10:18:37 12 can collect that money. It's your job to figure out how best
10:18:40 13 logically to handle this case.

10:18:42 14 You only have one job, and that's to resolve the
10:18:45 15 case. And you can resolve it by trial and, as I said earlier,
10:18:49 16 I'm not going to try to talk you out of your trial. I don't
10:18:53 17 mind sitting up here and hearing a trial. But what I do expect
10:18:56 18 you to do and where I will crack down on things is not to waste
10:18:59 19 my time and everybody else's time by throwing up a whole lot of
10:19:07 20 claim terms that need construing that aren't going to have
10:19:10 21 anything to do with the actual claims themselves that you
10:19:12 22 intend to try in the case.

10:19:14 23 So we're going to start with the idea of you trying
10:19:16 24 to sit down and work this out among yourselves. And if you
10:19:19 25 can't do it, then I'll get involved and work it out for you.

10:19:23 1 But one of the things that you are required to do in
10:19:26 2 my court now that you're all here is to treat this case
10:19:29 3 seriously and spend a lot of time on it trying to work out how
10:19:33 4 to get it in shape and get it stuffed around to where everybody
10:19:38 5 can get their arms around it and understand how it's going to
10:19:42 6 be tried. I'm not going to do it for you. Because at the end
10:19:46 7 of the day, when you can't agree, then what the taxpayers of
10:19:49 8 this country pay me to do is make decisions. But we're going
10:19:52 9 to get it down to where we've got somebody saying X and
10:19:56 10 somebody saying Y, and then I can go one way or the other or I
10:20:01 11 can come up with my own. But I want you to narrow it down to
10:20:05 12 where, if somebody is arguing one way and somebody is arguing
10:20:08 13 the other way, that you can present me with your best argument.
10:20:11 14 And at that point I'll make the decision as to what we're going
10:20:14 15 to hear and where we're going to go with it.

10:20:18 16 So I'm not going to do it right now. I want you to
10:20:20 17 sit down and work on this. I have yet to see a case or read
10:20:27 18 about a case -- I'm sure there's one out there -- where there
10:20:31 19 were 70 claims that were submitted to the jury. If you think
10:20:34 20 the jury has enough time to read all of that, you're just
10:20:40 21 wrong. So demean yourselves like the trial lawyers I believe
10:20:44 22 you are and work on this from the jury's perspective and work
10:20:49 23 this case down on, if you don't settle it, how you're going to
10:20:53 24 get it to trial.

10:20:54 25 And you'll be a lot happier about that because, if

10:20:56 1 you don't settle and you come back to me and we're having a
10:21:00 2 series of pretrial conferences on how we're going to get this
10:21:03 3 case worked down to trial, then I'll just start slashing it on
10:21:10 4 my own.

10:21:11 5 MR. HEJNY: Thank you, Your Honor. Halliburton will
10:21:13 6 work with the plaintiff, and we'll see if we can come to some
10:21:14 7 sort of agreement on trimming it down.

10:21:16 8 THE COURT: Well, everybody work together on this you
10:21:19 9 know, maybe Mr. Collins will tell you in descending order how
10:21:22 10 many claims he's going to assert against each one of you, and
10:21:25 11 then you can pick out the small one and see if you can make a
10:21:28 12 deal on that or something of that nature.

10:21:31 13 All right. Now, what I propose to do, Ms. Carmona
10:21:37 14 has circulated our usual chart for deadlines. If you presume
10:21:44 15 at the bottom of that the tutorial is going to read
10:21:47 16 November 12, 2014 at 9 o'clock and the Markman hearing is going
10:21:52 17 to read April the 2nd, 2014 at 9 o'clock, do you-all think you
10:21:56 18 can agree on the other dates in there if I sent you away to
10:22:02 19 come back with an agreed scheduling order now that we know what
10:22:05 20 the back end of it is?

10:22:07 21 MR. COLLINS: Your Honor, Plaintiffs certainly could.

10:22:10 22 MR. HEJNY: Yes, Your Honor.

10:22:11 23 MR. CHIBIB: Yes, Your Honor.

10:22:12 24 MS. WAHLS: Yes, Your Honor.

10:22:13 25 MS. HANSEN: Yes, Your Honor.

10:22:14 1 THE COURT: I think you can. And bear in mind that a
10:22:17 2 week here or ten days here doesn't make a big amount of
10:22:20 3 difference in this case. So be reasonable.

10:22:23 4 How long do you-all think you might need -- the
10:22:26 5 important dates to me are the courtroom times, the tutorial and
10:22:29 6 the Markman. We have that. And I realize you've got
10:22:32 7 conversations in there, and there are a bunch of you. How long
10:22:37 8 do you think it would be before I might expect an agreed
10:22:40 9 amended scheduling order that applies to all cases.

10:22:48 10 MR. COLLINS: Your Honor, from the plaintiff's
10:22:50 11 perspective, we could certainly take the first stab at throwing
10:22:54 12 out some dates that look very much like the sequence of dates
10:22:58 13 that we used in the previous scheduling order to get us to
10:23:02 14 April 2nd and maybe try to build in a little bit of float time
10:23:06 15 for the holidays when we don't have deadlines. We can get
10:23:10 16 something in the next --

10:23:11 17 THE COURT: It's a very un-federal judge like thing
10:23:13 18 to say, but I recognize the holidays.

10:23:16 19 MR. COLLINS: And so do attorneys, even though
10:23:18 20 sometimes we like to deny it.

10:23:21 21 THE COURT: Well, it depends on when your firm
10:23:24 22 figures up the formula for how much money you're going to get
10:23:27 23 paid for the next year whether you need to work over the
10:23:29 24 holidays or not. I understand how that is. If you need to
10:23:32 25 work over the holidays, work. But I'm not going to ask you to

10:23:37 1 work over the holidays for me.

10:23:38 2 MR. COLLINS: We could circulate some proposed dates
10:23:42 3 leading up to the April 2nd Markman, you know, by, say, noon
10:23:45 4 tomorrow to all the defendants and let them talk amongst
10:23:51 5 themselves.

10:23:51 6 THE COURT: Well, go to the end. How long do you
10:23:53 7 think it will take you to get me an agreed order?

10:23:55 8 MR. COLLINS: Oh.

10:23:56 9 MS. WAHLS: Your Honor, I would think we'd be able to
10:24:00 10 submit something probably by the end of the week. Very early
10:24:05 11 next at the latest.

10:24:06 12 THE COURT: Well, why don't I just give you a week
10:24:07 13 and say I would like to have a scheduling order by August the
10:24:11 14 19th. Does that work?

10:24:14 15 Now, let me tell you how I want you to do this. If
10:24:21 16 it's one thing that drives me nuts, I don't want to see one
10:24:27 17 order that has six different styles on the same order. Do it
10:24:32 18 the way we've done it in the 111 and 112 cases, the Halliburton
10:24:38 19 and Schlumberger case. Do a separate order in each case. The
10:24:41 20 body of it will be the same, the dates will be the same.
10:24:46 21 Because we're doing this just because on things that we can
10:24:49 22 work in tandem on, I want to work in tandem on. But it's -- it
10:24:53 23 just makes more sense to not do some big fancy thing that the
10:24:57 24 first three pages are nothing but caption. So do it in each
10:25:03 25 case. And we'll have six different orders, but they will all

10:25:06 1 look the same, the way we've done it with Halliburton and
10:25:10 2 Schlumberger.

10:25:11 3 Now, what I have got in front of me still is your
10:25:26 4 status report -- joint status report in the Schlumberger case
10:25:31 5 on removing counsel. And I've read it carefully. I know each
10:25:46 6 party's position. I don't see how I can possibly make a
10:25:53 7 decision on it based on just representations. I appreciate the
10:25:57 8 efforts that you-all have put into attempting to resolve this
10:26:02 9 and that you have been unable to do so, so far, as of
10:26:06 10 July 29th. I've got one side saying that I want everybody
10:26:13 11 removed and the other side saying they don't even want a motion
10:26:16 12 filed in that regard.

10:26:18 13 So somebody want to address that with me.

10:26:23 14 MS. WAHLS: Yes. Your Honor, Schlumberger intends to
10:26:24 15 file a motion -- a disqualification motion by the end of this
10:26:27 16 week.

10:26:30 17 MR. COLLINS: Your Honor, Plaintiff's position is
10:26:31 18 that there's a stay in place and the Court would need to lift
10:26:35 19 the stay in order for that to happen.

10:26:37 20 THE COURT: That's not a hard thing for me to do,
10:26:40 21 because I do not know how I can possibly determine this without
10:26:48 22 getting a motion and a response and then seeing where we are.
10:26:53 23 So as of this moment, the stay is lifted to allow Schlumberger
10:27:05 24 to file whatever motion it deems appropriate to remove whomever
10:27:12 25 Schlumberger is going to try to remove.

10:27:18 1 Now, with that statement having been made, let me ask
10:27:34 2 you, counsel, how long -- when do you think you can file that
10:27:38 3 motion?

10:27:38 4 MS. WAHLS: Your Honor, I believe we will probably
10:27:40 5 file it by the end of this week.

10:27:45 6 THE COURT: All right. Well, I'm going to tell you
10:27:48 7 the stay is lifted for you to file a motion no later than
10:27:52 8 August the 19th. I'll give you a week on that.

10:27:57 9 MS. WAHLS: Thank you, Your Honor.

10:27:58 10 THE COURT: Now, Mr. Collins, what that means is
10:28:03 11 you'll have under our local rules whatever the local rules
10:28:06 12 provide on a non-dispositive motion to respond to it.

10:28:12 13 Now, what's going to happen, I can just tell you, is
10:28:19 14 you-all are going to disagree then how we proceed after that.
10:28:28 15 I read your joint status report and I appreciate all the effort
10:28:31 16 that went into it, but I didn't see much in the way of
10:28:33 17 agreement in it. So what I want you to do is, once the motion
10:28:39 18 and response is filed, to get on the phone with one another and
10:28:45 19 try to work out what you really think you're going to need in
10:28:49 20 the way of protective orders and reasonable discovery to get me
10:28:55 21 to that motion, because I want to deal with that motion
10:29:01 22 extremely quickly because everything kind of hinges off of
10:29:07 23 that.

10:29:07 24 So quickly after the response is filed, talk about it
10:29:13 25 because we're going to put it on a tickler and we're going to

10:29:15 1 get back with you pretty quickly and set up a conference call.
10:29:19 2 I don't need to get you down here to talk about it. If I need
10:29:26 3 somebody, Mr. McConnico is never very busy. He can just run
10:29:30 4 over here.

10:29:31 5 MR. MCCONNICO: I'm always ready to run, Your Honor.
10:29:35 6 But I was going to ask Your Honor, I've got another hearing at
10:29:37 7 11:00. Can I leave a little early? It's in state court.

10:29:41 8 THE COURT: You may. I will not construe it as a
10:29:43 9 lack of interest. And as long has Ms. Wahl thinks it's all
10:29:47 10 right, you can go.

10:29:50 11 MR. MCCONNICO: I think she can handle this very,
10:29:52 12 very well.

10:29:52 13 THE COURT: She's been doing okay so far.
10:29:55 14 So that's what I want to do. So start working,
10:29:57 15 again, reasonably on what you think you're going to need to get
10:30:00 16 me to a point where I can make a decision on what we're going
10:30:04 17 to do about this because, you know, I'm going to allow some
10:30:11 18 discovery on it. I want you to know that. I know you've done
10:30:16 19 a lot of dealing with reading the report on eyes only and
10:30:21 20 attorneys' eyes only and things like that, so think about that.

10:30:24 21 You can have a separate confidentiality order that
10:30:31 22 just covers that motion. It doesn't have to be drawn into
10:30:33 23 anything else. We're going to proceed on what we're doing, but
10:30:36 24 then I'm looking at this over here on the side because it's
10:30:42 25 something that I want to get dealt with as quickly as possible.

10:30:47 1 Now, what that does, based on the allegations that
10:30:53 2 have been in the joint status report, and the gravity of the
10:31:04 3 situation as you express it to me, is we're sitting here on
10:31:08 4 August the 12th and we have a motion to dismiss in the
10:31:12 5 Schlumberger case scheduled for September the 10th. Now, if
10:31:20 6 there is a motion to disqualify filed on the 19th, that means I
10:31:26 7 will get a response sometime the latter part of August. That
10:31:33 8 leaves us from precious little time before that motion is to be
10:31:38 9 argued. And I can tell you that I probably and you probably,
10:31:44 10 with whatever discovery or what you want to present, are not
10:31:48 11 going to get it all to me by the 10th, and I'm probably not
10:31:52 12 going to have it ruled on by the 10th if you do.

10:31:55 13 So what are your thoughts on the hearing on the
10:31:58 14 motion to dismiss as it fits in the context with the motion to
10:32:03 15 disqualify?

10:32:04 16 MS. WAHLS: Your Honor, I believe Schlumberger would
10:32:06 17 like to proceed with the motion to dismiss in parallel with the
10:32:10 18 motion to disqualify. So keeping the September 10th hearing
10:32:16 19 date on the motion to dismiss.

10:32:18 20 THE COURT: So I take that as a statement that, even
10:32:26 21 if Ms. Rutherford has all of this information, it is not
10:32:34 22 information that would affect the motion to dismiss; is that
10:32:38 23 right?

10:32:39 24 MS. WAHLS: Well, the motion to dismiss is based on
10:32:41 25 Section 101 grounds, and so it's just, in our view, a different

10:32:45 1 issue.

10:32:45 2 THE COURT: All right. Mr. Collins, are you in
10:32:47 3 agreement that we proceed with the motions to dismiss on the
10:32:50 4 10th of September.

10:32:51 5 MR. COLLINS: Plaintiff has no objection to that.

10:32:53 6 THE COURT: All right. Then we'll leave that set the
10:32:56 7 way it is. I just didn't want us to get into this
10:33:00 8 disqualification thing and, again, it's in the context of time
10:33:04 9 is precious to me and I hear from you-all when it's too late
10:33:07 10 for me to set something else on the 10th that you don't think
10:33:10 11 it would be appropriate.

10:33:13 12 So the motions to dismiss in the Schlumberger and
10:33:16 13 Halliburton cases remain set for 2 o'clock on September 10th.
10:33:21 14 And we will proceed on these.

10:33:23 15 THE COURT: Mr. Chibib?

10:33:24 16 MR. CHIBIB: Your Honor, I'm sorry. Some of the
10:33:27 17 other defendants have filed sort of "me too" motions on the
10:33:30 18 motion to dismiss. I know Paradigm did yesterday. Would we be
10:33:34 19 part of that hearing as well? We're not going to need to
10:33:37 20 separately argue. We just want to participate with the
10:33:39 21 hearing.

10:33:40 22 THE COURT: Well, I don't know. If you're not going
10:33:43 23 to separately argue, what does "participate in the hearing"
10:33:45 24 mean, because that's what I anticipate as argument?

10:33:50 25 MR. CHIBIB: Yeah. Okay.

10:33:52 1 THE COURT: But go back and restate your question.

10:33:54 2 What are you saying you want to do on the 10th?

10:33:57 3 MR. CHIBIB: I was simply commenting -- you had

10:34:00 4 remarked that for the *Halliburton* and *Schlumberger* cases, there

10:34:04 5 would be a hearing on the 10th. I would just ask if that would

10:34:07 6 also be for the consolidated cases for those of us who also

10:34:10 7 filed a motion to dismiss on those same grounds?

10:34:13 8 THE COURT: Well, I will look at that later,

10:34:15 9 depending upon what the responses are and what the filings are

10:34:19 10 and whether that's realistic and how close they are to being

10:34:24 11 the same. I'm not going to put Mr. Collins in a situation

10:34:29 12 where he cannot adequately answer them. So we'll just play

10:34:33 13 that by ear. I'm not going to set any other motions to dismiss

10:34:37 14 at this point. So if you filed something yesterday, what did

10:34:41 15 you think my earlier statement about not filing anything until

10:34:45 16 we had this hearing?

10:34:47 17 MR. CHIBIB: We filed that in lieu of an answer,

10:34:49 18 Your Honor --

10:34:49 19 THE COURT: All right.

10:34:50 20 MR. CHIBIB: -- under 12(b).

10:34:51 21 THE COURT: Okay. All right. Well, we'll take a

10:34:54 22 look at that. Right now only *Schlumberger* and *Halliburton* are

10:34:59 23 on the 10th. Ms. Carmona, does that mean there's not a motion

10:35:12 24 in *Halliburton*?

10:35:12 25 MR. HEJNY: Your Honor, it's just *Schlumberger*'s

10:35:15 1 motion to dismiss. Halliburton did not file a motion.

10:35:18 2 THE COURT: All right. It's Emerson that filed the
10:35:20 3 other one. All right. Well, right now only Schlumberger is
10:35:23 4 set for 2 o'clock on the 10th, but I'm open about setting other
10:35:28 5 motions at that time. But I'm going to wait until I see what
10:35:31 6 they are.

10:35:32 7 MR. COLLINS: Your Honor, just one point of
10:35:33 8 clarification. The court is not setting the hearing on the
10:35:36 9 motion to disqualify for September 10th, correct?

10:35:40 10 THE COURT: No. That's -- that's what I already
10:35:42 11 have. I have not set anything on the motion to disqualify. As
10:35:45 12 I said, what I want you-all to do, once I have the motion and
10:35:49 13 the response, is to talk about what you realistically need to
10:35:54 14 get that motion in shape for me to hear it so I'll have
10:35:57 15 everything in front of me.

10:35:59 16 MS. WAHLS: Yes, Your Honor.

10:36:00 17 THE COURT: Okay. Anything else while I have you-all
10:36:03 18 here?

10:36:06 19 MR. HEJNY: Your Honor, one more issue from
10:36:11 20 Halliburton. I'm not sure if the court is aware, but
10:36:14 21 Halliburton on July 18th filed a petition for inter partes
10:36:19 22 review with the patent office. We will not know until late
10:36:23 23 January whether or not the patent office is going to institute
10:36:25 24 a review based on that petition. At that time Halliburton
10:36:28 25 would anticipate potentially filing a brief motion to stay --

10:36:32 1 THE COURT: A brief motion to stay?
10:36:33 2 MR. HEJNY: Yes, Your Honor.
10:36:35 3 THE COURT: How can a motion for stay be anything but
10:36:38 4 brief?

10:36:39 5 MR. HEJNY: Would that be something the Court would
10:36:41 6 be willing to entertain?

10:36:43 7 THE COURT: Well, anything you file I'm going to
10:36:45 8 entertain. I will tell you it's going to be the rare day that
10:36:48 9 I'm going to stay anything while I wait on the patent office to
10:36:51 10 do something. I'll just tell you that. They take a long time
10:36:59 11 to do things. I understand what they say. I understand
10:37:01 12 sometimes there's an exception. But it is not my intention to
10:37:04 13 hold this case up because of inter partes review.

10:37:08 14 At some point the congress is going to have to
10:37:11 15 determine whether they want to keep these parallel things going
10:37:14 16 on or not. They have not shown any stomach toward doing that
10:37:18 17 yet. I think most federal judges would welcome the congress to
10:37:24 18 say, When such a review is filed, the patent office
10:37:28 19 automatically has jurisdiction and we lose all jurisdiction in
10:37:31 20 the case. Or if the lawsuit gets filed first, the federal
10:37:34 21 courts have jurisdiction and nothing's going to go back to the
10:37:36 22 patent office on it.

10:37:38 23 I think this is a really bad process we have, where
10:37:41 24 things can proceed on parallel tracks. I think that is one of
10:37:46 25 the things that makes patent litigation so expensive, but I'm

10:37:49 1 not listened to. I can just tell you that I'm not going to
10:37:53 2 hold up things in my court while somebody goes back to the
10:37:56 3 patent office. Unless you have a compelling reason -- if I see
10:38:00 4 a motion and there's a compelling reason, you know, I'm going
10:38:03 5 to look at it and I will at least pay attention to the motion.
10:38:07 6 But I wouldn't take it easy on anything else you're doing in
10:38:11 7 this case because you really think something is going to
10:38:14 8 happen.

10:38:15 9 I don't like to stay things -- and it's not just in
10:38:17 10 patent cases -- pending somebody else's action that I don't
10:38:21 11 have any control over. The most you're likely to get -- and
10:38:31 12 none of it is going to occur for a while. But if I had a
10:38:34 13 strong reason to believe that some ruling by the patent office
10:38:38 14 was imminent, I might give you a brief stay pending further
10:38:42 15 order of the court. But I'm not ever going to give you a stay
10:38:46 16 that just says, pending a resolution by the patent office,
10:38:50 17 because that could take the rest of my active career. And I've
10:38:53 18 seen it happen in some cases.

10:38:55 19 So file whatever you need to file to represent your
10:39:00 20 client, but don't have a whole lot of confidence that you're
10:39:03 21 going to get a stay while the patent office figures out what
10:39:06 22 they're going to do with it.

10:39:08 23 MR. HEJNY: Yes, Your Honor.

10:39:09 24 THE COURT: What else?

10:39:09 25 (No response)

10:39:10 1 THE COURT: All right. Well, I appreciate everybody
10:39:13 2 being here. I look forward to working with you on this case,
10:39:20 3 and we'll just see how it goes.

10:39:25 4 But, remember, work together on things. If you've
10:39:28 5 got a problem with one of your opponents, get on the phone and
10:39:31 6 work it out. Do not try to work it out by E-mail. That never
10:39:35 7 works. The E-mails just escalate, and then somebody gets
10:39:39 8 really frustrated and files a motion for sanctions and prints
10:39:43 9 out all the E-mails and attaches them.

10:39:46 10 I don't want to read your E-mails. I don't care what
10:39:49 11 you call one another. I don't care how much you like one
10:39:52 12 another. You're always better off if you work out your
10:39:54 13 problems, because what happens if you don't work them out, your
10:39:57 14 problem then becomes my problem and I might guess wrong as to
10:40:03 15 who I think the most inconsiderate attorney is or the attorney
10:40:09 16 that is causing most of the conflict. It often is like the
10:40:12 17 football player who throws the second punch. That's the one I
10:40:16 18 see. So you have that risk.

10:40:18 19 The other risk you have if you don't work it out is
10:40:22 20 that I won't do what either one of you wants to do. Don't
10:40:26 21 think if I have a dispute and one party says one thing and one
10:40:32 22 party says the other thing, that means I'm going to do one or
10:40:35 23 the other. I'm going to work it out the way it best suits my
10:40:38 24 schedule and my docket, and it might not be to either one of
10:40:42 25 your satisfactions.

10:40:43 1 So bear in mind it's always better to work out your
10:40:45 2 problems in these cases. Do it by phone. The very best way is
10:40:51 3 to go to lunch, but I know a lot of you are in different
10:40:54 4 cities. But if you can get together with one another, it's
10:40:57 5 always better than trying to do it by E-mail. It just -- it's
10:41:03 6 too easy to hit "send" when you have a dispute.

10:41:06 7 You know, it's part of the problems we've got in the
10:41:09 8 computer world. When I started practicing, we had people
10:41:12 9 called secretaries and they would come into your office and
10:41:15 10 you'd dictate a letter. So my opponent would do something that
10:41:19 11 I'd really didn't like and I'd get the secretary in because I
10:41:21 12 was really mad and I'd dictate the letter and she'd type a
10:41:25 13 draft and bring it in and I'd be busy doing something else and
10:41:28 14 it would sit for a while. And then when I read it, I'd cooled
10:41:31 15 down a little bit so I'd tone the letter down and make some
10:41:34 16 changes in it and send it back. By the time I got the final
10:41:37 17 draft, I'd really cooled down a lot and most of the time it
10:41:40 18 didn't get sent. But if it did, it wasn't nearly as
10:41:45 19 inflammatory as what I see in the E-mails. So don't let your
10:41:47 20 first reaction be to send out an irate E-mail.

10:41:51 21 Secondly, pay attention to our local rule on
10:41:55 22 certificates of conference. The local rules provide that on
10:41:59 23 every non-dispositive motion you will have a certificate of
10:42:03 24 conference. Read what must be included in the certificate of
10:42:06 25 conference. It is not an adequate certificate of conference

10:42:11 1 for me to see that I sent an E-mail to my opponent or even made
10:42:17 2 a phone call to my opponent at 10 o'clock this morning. I
10:42:21 3 haven't heard back. I want to get this filed, so I don't know
10:42:24 4 what their position is. That is not sufficient.

10:42:27 5 Read the local rule on what must be in a certificate
10:42:31 6 of conference. And it basically is: You need to tell me in
10:42:35 7 the certificate of conference that you've discussed the motion
10:42:38 8 with your opponent and these are the reasons that the opponent
10:42:40 9 is opposed to it.

10:42:42 10 If you make several attempts to get ahold of your
10:42:45 11 opponent and you don't get anything back, then I will listen to
10:42:51 12 that in a certificate of conference. But "several attempts"
10:42:54 13 means over a reasonable period of time. So don't wait until
10:42:57 14 the last minute to start trying to find out.

10:43:01 15 You-all know what the issues in dispute are going to
10:43:04 16 be, and you can know before you even draft a motion what your
10:43:07 17 opponent's response is going to be if you'll just call them and
10:43:11 18 say, This is what we're going to do. We think it's necessary.
10:43:14 19 What is your thoughts on it? But comply with the local rule on
10:43:19 20 the certificates of conference. Otherwise, I often just
10:43:24 21 dismiss motions that don't have adequate certificates of
10:43:28 22 conference on them and then you've got to start over. So bear
10:43:31 23 that in mind.

10:43:31 24 I have an open chambers policy. You may call
10:43:34 25 Ms. Carmona or any of my clerks if she's not here, and talk to

10:43:39 1 her about routine things -- what form do we like things
10:43:43 2 in? what are we likely to do in the way of scheduling? Do not
10:43:47 3 talk to her about anything substantively. Do not ex parte
10:43:52 4 her -- and you don't need my lecture on ex parte-ing. You-all
10:43:57 5 know what it is.

10:43:57 6 If you need to have a conference call among all or a
10:44:00 7 portion of you, that's fine. Call her and she'll get with my
10:44:03 8 schedule and set it up. Again, I don't need to run everybody
10:44:06 9 in here every time we have something come up.

10:44:08 10 I know that -- that some of you have more than one
10:44:14 11 attorney involved in the case. Generally if I'm going to
10:44:18 12 schedule a conference call, I'm going to schedule it when one
10:44:22 13 attorney for every party that needs to be on the call can be
10:44:26 14 present. If you want to have others, that's fine. But I'm not
10:44:30 15 going to put off a conference call until one party can have
10:44:33 16 three lawyers present or something like that. I want one when
10:44:36 17 I set up the conference call if we need to do it, and we can do
10:44:41 18 a lot of things by conference call. We've done it in other
10:44:44 19 cases, and we'll work on it that way.

10:44:48 20 If you ex parte Ms. Carmona or any of my clerks, you
10:44:54 21 can get on the "may not call chambers list." And I've been
10:44:57 22 doing this a little over 11 years now, and nobody has ever
10:45:01 23 gotten on that list. So if you've always wanted to be first on
10:45:03 24 anything, just overstay your welcome when you call my chambers,
10:45:07 25 and I can assure you you can rise to the head of the class and

10:45:10 1 be the first person to ever get put on a "may not call chambers
10:45:14 2 list."

10:45:14 3 So end of the day, it is you-all work things out,
10:45:18 4 you-all work together. Bring me the big issues that are
10:45:23 5 outcome determinative and I will rule with them, but don't
10:45:26 6 bring me the little ticky-tacky stuff.

10:45:29 7 If there's nothing else, thank you for being here
10:45:30 8 this morning. Court's in recess.

10:45:33 9 (End of transcript)

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1 **UNITED STATES DISTRICT COURT**)

2 **WESTERN DISTRICT OF TEXAS**)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 14th day of August 2014.

11

12 /S/ Arlinda Rodriguez
13 Arlinda Rodriguez, Texas CSR 7753
14 Expiration Date: 12/31/2014
Official Court Reporter
United States District Court
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